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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

MILDRED M. EDWARDS, ETC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Petitioner has improperly stated the question presented. Petitioner's question begs the issue, for it assumes that the government's notice of appeal filed in the district court sought to appeal only part of this case, and that the decision appealed from did not involve a constitutional question. Respondent suggests that the following is a more appropriate statement of the question presented:

> Whether, when a district court has held an Act of Congress unconstitutional in a civil case where an officer of the United States is a party, any appeal must be directly to this Court under 28 USC § 1252.

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STATEMENT OF THE CASE

Petitioner's (hereinafter the Secretary) description of the case and the rulings of the district court below ignored a number of crucial developments. Since these actions are important for resolution of the jurisdictional issues before this Court, respondent feels compelled to augment her Statement.

1. Respondent filed this case as a nationwide class action challenging the constitutionality of section 211(a)(5)(A) of the Social Security Act, 42 USC §411(a)(5)(A), and seeking to halt the Secretary's continued use of that provision. Although two courts had held the statute unconstitutional prior to the filing of the complaint, *Carrasco v. Secretary of HEW*, 628 F.2d 624 (1st Cir. 1980); *Becker v. Harris*, 493 F.Supp. 991 (E.D. Cal. 1980), neither case had been a class action and the Secretary "continued to apply the challenged section." (Dist.Ct.Memo. Decision and Order, Jan. 22, 1982, Pet.App.6a n.2.)[1]

2. In light of the rulings in *Carrasco*, *Becker*, and *Hester*, the district court, at its first status conference on January 19, 1981, urged the parties to attempt to settle the case. The parties agreed to try and resolve both the class issues and the

[1]The Secretary implies that the unconstitutionality of the statute was fully resolved at the time the complaint was filed, and that the government had already conceded that point. That is not true. Not only did the Fifth Circuit render another decision on this issue a month after the filing of the complaint herein, *Hester v. Harris*, 631 F.2d 53 (5th Cir. 1980), but the Secretary was still fighting *Carrasco*, having filed a petition for rehearing which was not denied until December 4, 1980.

More importantly, the Secretary's formal decision to acquiesce in the *Becker* ruling did not occur until July, 1981, *after* the district court in this case had certified a nationwide class and granted summary judgment for that class on the issue of liability (see Order of May 22, 1981, Pet. App., at 3a-4a).

standards to be applied to determine the social security benefits of the class members. Only after 4 months of negotiations failed to produce any results did the district court proceed with ruling on plaintiffs' motions for partial summary judgment and class action, and the Secretary's motion to remand.

3. Recognizing, as the Secretary acknowledged in her answers to discovery, that since *Carrasco, Hester* and *Becker,* "no final regulations or policies have been issued regarding section 211(a) (A) (vi) of the Social Security Act," the district court again, after its Order of May 22, 1981, asked the parties to meet to resolve the outstanding issues. In a Joint Status Report filed in July, 1981, the parties informed the court that they could not agree on what standards were constitutionally required for determining the class members' benefits. As a result, the court set a briefing schedule which culminated in the Memorandum Decision and Order of January 22, 1982. (Pet.App., at 5a-12a.)

4. The January 22, 1982 Order explicitly concerned the constitutionally required relief which was to be afforded the plaintiff class members. The district court noted that it was faced with a recalcitrant agency which continued to apply the unconstitutional statute even after *Carrasco, Hester,* and *Becker,*[2] Pet.App., at 6a n.2, and which "failed" to adopt

[2]The Secretary's continued attempt to use the unconstitutional presumption in section 211 (a)(5)(A) was alluded to again by the Court in its Order of March 19, 1982 (Pet.App., at 13a-15a), and in its Order Re: Motion for Fees entered December 1, 1982. In the latter order, Judge Patel reiterated (at 4):

> "Defendant's concession as to the unconstitutionality of the statute involved in this action did not fully resolve the merits. Despite that concession, defendant continued to apply the statute to new class members and full relief clearly required further litigation on the merits."

new rules after given the opportunity to do so by the *Carrasco* court Thus, based on its constitutional power to " 'minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse,' *Califano v. Wescott,* 443 US 76, 90 (1979)" (Pet. App., at 9a), the court determined the nature of the extension of benefits to be provided to the plaintiff class. The district court then entered a final judgment on March 23, 1982 (Pet.App., at 16a) in favor of plaintiffs, holding the statute unconstitutional and granting the plaintiff class the relief established in its Order of January 22, 1982.[3]

5. The Secretary then appealed from the court's final judgment. (Pet.App., at 17a.) The notice of appeal states that the Secretary is appealing from the "final judgment entered . . . on March 23, 1982." It does not indicate that the Secretary's appeal is limited to any particular claims or issues. The Secretary did not file a notice of appeal to this Court.

Pursuant to an experiment for expediting appeals, the Ninth Circuit then required the Secretary to fill out a civil docketing statement. The statement is nonbinding and was developed to be used as the basis for a conference with a circuit court attorney. The purpose of the system was to adopt reasonable and prompt briefing schedules, set page limits, and weed out improper appeals. It was on this Ninth Circuit form that, for the first time, the Secretary stated she would not defend the constitutionality of the statute on appeal, but would contest the extension of benefits ordered by the district court as relief.

Respondents then timely filed their motion to dismiss con-

[3]As the Secretary has pointed out, the district court also issued an additional Order on March 19, 1982 (Pet. App., at 12a), clarifying the January 22, 1982 Order, prior to entering a final judgment.

tending that the government had a right to appeal the district court's judgment to this Court under 28 USC §1252 and that, therefore, the Court of Appeals had no jurisdiction over the Secretary's appeal pursuant to 28 USC §1291. *Donovan v. Richland County Association for Retarded Citizens,* 102 S.Ct. 713 (1982). The Ninth Circuit agreed and dismissed the appeal.

SUMMARY OF ARGUMENT

1. A. Unlike other direct review provisions, 28 U.S.C. §1252 was intended to project an expansive view of this Court's mandatory docket. That Congress intended this is supported by three factors. First, the provision permits "any party" to seek direct review. Secondly, it does not narrowly limit the kinds of district court orders which can be reviewed. Thirdly, it does not restrict review to constitutional issues, but provides that all issues on appeal are to be considered by this Court. Relying on these aspects of the provisions, this Court has consistently applied a broad reading of §1252.

B. This Court's expansive interpretation of §1252 has recognized that Congress was motivated by a concern with the impact on the administration of federal programs when a statute is held unconstitutional. Thus, the remedy is an integral component of the district court's ruling, and the relief ordered cannot be separated from the holding of unconstitutionality. In this instance, the relief is the extension of benefits to the class disfavored by the challenged statutory scheme, and this Court has previously recognized the constitutional implications inherent in this form of relief. Consequently, even under the Secretary's restrictive view of §1252, the constitutional issues implicated in the relief require direct review by this Court.

C. Section 1252 unambiguously establishes four factors which must be satisfied for direct review in this Court. Incorrectly relying on the more restrictive view of other direct appeal provisions, however, the Secretary adds a fifth prerequisite, that the review sought be of the holding of unconstitutionality. This reading is not supported by the language of the provision. It also contradicts this Court's consistent recognition of the broad nature of § 1252. In at least two cases, this Court has recognized jurisdiction of appeals which do not comply with the Secretary's proposal.

The Secretary's effort to bolster her argument by reference to the second paragraph of § 1252 proceeds from the incorrect premise that the only appeals which could be pending in a Court of Appeals, and thus potentially subject to the second paragraph, are those which derive from an order holding an Act of Congress unconstitutional. In fact, though, appeals on non-constitutional rulings prior to the ruling of unconstitutionality could well be pending; the second paragraph was designed to avoid splitting appeals and to bring the entire case, including the non-constitutional issues, before this Court. There is no validity, therefore, to the Secretary's assertion that the second paragraph was designed only to provide a mechanism to handle appeals related to the holding of unconstitutionality. Congress contemplated that non-constitutional issues would be presented to this Court pursuant to § 1252.

The legislative history provides no support for the Secretary. The background of this provision, especially the late amendments to it, render the discussions in the House unpersuasive as authority, and suggest, if anything, Congress' desire to construct a direct review statute which would ensure that the whole case came to this Court.

Further damaging to the Secretary's effort to rewrite the clear command of § 1252 are the illogical results flowing from her interpretation. As a practical matter, the Secretary delegates to herself the unilateral power to determine to what court an appeal should go. By purporting to challenge the holding of unconstitutionality, even where to do so would be frivolous, the Secretary can bring the case to this Court. By not appealing that aspect of the ruling below, the Secretary can direct the case to the Court of Appeals, as she seeks to do here. The truly significant event, the action of the district court, is ignored in favor of the Secretary's unfettered choice of a forum. The proper focus, however, is on the ruling's impact on the administration of the given federal program; to permit the government to select between appellate forums is nowhere supported by the language or purpose of § 1252.

2. The Secretary has alternatively argued that, if this Court agrees with respondent, it should order the judgment below vacated so that she may timely appeal to this Court. No good cause exists for such an action. This Court emphatically described the obligations of government officials to proceed to the Supreme Court under § 1252 before the notice of appeal was filed in their case. The Secretary's failure to follow that mandate is inexcusable; if she had any doubts, she could have noticed appeals in both courts. If would be unjust and confusing to undo the benefits which have flowed to the respondent class pursuant to the district court's judgment.

ARGUMENT

I.

THE COURT OF APPEALS DID NOT HAVE JURISDICTION OF THE SECRETARY'S APPEAL UNDER 28 USC §1291 SINCE THE SECRETARY COULD HAVE APPEALED DIRECTLY TO THIS COURT UNDER 28 USC §1252.

A. The Uniquely Broad Jurisdictional Grant of Section 1252 Distinguishes it From Other Direct Appeal Provisions and Stands in Contrast to the General Effort to Limit this Court's Mandatory Docket.

The Secretary is seeking review in the Court of Appeals, pursuant to 28 USC §1291, of the district court's summary judgment holding an Act of Congress unconstitutional. There is no dispute, however, that the Court of Appeals has no jurisdiction under §1291 "where direct review may be had in the Supreme Court". Indeed, just *before* the government filed its notice of appeal herein, this Court, in a *per curiam* decision, reiterated that if a direct appeal lies to the Supreme Court under 28 USC §1252, it "serve[s] to deprive the Court of Appeals of jurisdiction . . . [under] 28 USC §1291." *Donovan v. Richland County Association for Retarded Citizens, supra* at 713.

In *Donovan,* the Court also noted that Congress had set forth "clear commands" in support of an expansive view of the court's mandatory docket when it adopted §1252. 102 S.Ct., at 714. Thus, this Court recognized that section 1252 is unique among the direct appeal statutes enacted by Con-

gress.[4] First, section 1252 allows "any party" to appeal, thus establishing the broadest possible pool of potential appellants. Appeals are not limited to either the party defending the constitutionality of the statute or the federal government. See *Regan v. Taxation with Representation of Washington*, _____ US _____, 103 S.Ct. 1997, 1999-2000 n.3 (1983).[5]

Second, § 1252 contains no limitation on the nature of a given district court order which may be appealed. The appeal may be from "an interlocutory or final judgment, decree or order." By contrast, § 1253 is limited to review from decisions on injunctions, while § 1254 and § 1257 only apply to final judgments.

Third, and most important, § 1252 review is not limited to constitutional issues. The second paragraph of § 1252, to which there is no corollary in the other direct appeal statutes,

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[4]There are three other direct appeal provisions. 28 USC §§ 1253, 1254(2), and 1257(1) and (2). Section 1253 provides review of decisions of three-judge district courts. Since 1976, three-judge district courts have been virtually eliminated (P.L. 94-381); however, in those rare circumstances where they are required direct review may be obtained in this Court. Section 1254 provides review from courts of appeals by the party relying on a state statute which has been held unconstitutional by the appellate court. Appellate review under § 1254(2) is limited to "the federal questions presented." Section 1257(1) and (2) permits direct appeal from decisions of the highest court of a state when a state or federal statute is held unconstitutional. See Brief for Petitioner, at 25-26 n.18.

[5]Section 1252 is applicable only if the government is a party, but the government need not be the appellant. The government can be an original party or it may have intervened in the suit pursuant to 28 USC § 2403. The obligation to notify the attorney general when the constitutionality of a federal statute is at issue and the right of intervention were adopted by Congress in conjunction with § 1252. Act of Aug. 24, 1937, Ch. 754, 50 Stat. 751 *et seq.* The original version of the Act of 1937 limited direct appeals to the attorney general. See Brief of Petitioner, at 29-30 n.20. The limitation was removed by the Senate. 81 Cong.Rec. 8514.

calls for *all* other issues that are raised by the parties on appeal to be "treated as taken directly to the Supreme Court." As the Secretary concedes, "§ 1252 brings before [the Supreme Court] not only the constitutional question, but the whole case . . . ." *McLucas v. DeChamplain,* 421 US 21, 31 (1975) (citations omitted). See Brief of Petitioner, at 22 n.14.

Relying on the unique and "clear commands" of § 1252, this Court has recognized that the statute must be interpreted broadly. The purpose of Congress was "to afford immediate review in this Court in civil actions to which the United States or its officers are parties, and thus will be bound by a holding of unconstitutionality." *McLucas, supra,* at 31. Consequently, as this Court ruled again last year, "§ 1252 was an *unambiguous* exception to the policy of minimizing the mandatory docket of this Court." *California v. Grace Brethren Church,* US , 102 S.Ct. 2498, 2506 (1982) (emphasis supplied), citing *McLucas v. DeChamplain,* 421 US 21 (1975).[6] It thus cannot be compared to other direct appeal statutes such as § 1253, where the policy of restricting direct appeals influences the statutory interpretation.[7] See also *Donovan v. Richland County Association for Retarded Citizens, supra.*

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[6]Indeed, Rep. Summers, the chief supporter in the House of Representatives of the 1937 Act, noted that the House Committee had considered whether the statute would overburden the Supreme Court, but had decided the need for appellate review was important enough to risk overextending the court. 81 Cong.Rec. 3256.

[7]See, e.g., *Gonzalez v. Automatic Employees Credit Union,* 419 US 90 (1974).

B. The Remedy Adopted by the District Court is Itself an Intrinsic Aspect of the Constitutional Ruling and is Therefore Necessarily Subject to Review Pursuant to Section 1252.

This Court has carried out the intent of Congress by adopting a broad definition of what constitutes a district court holding that an Act of Congress is unconstitutional. All that is required to invoke § 1252 is that the "ruling of unconstitutionality [be] made in the application of the statute to a particular circumstance . . . ." *Fleming v. Rhodes*, 331 US 100, 102 (1947); see also *United States v. Darusmont*, 449 US 292 (1981). It does not even matter that the lower court "did not expressly declare a federal statute unconstitutional." *Grace Brethren Church, supra*, 102 S.Ct., at 2506.

In *Grace Brethren Church*, it was a state, not a federal, statute that was found unconstitutional. Since the state statutory scheme was so intertwined with the federal law, the district court's decision had the effect of stifling federal administration of the program.

> "§ 1252 provides jurisdiction . . . so long as a determination that a statutory provision was unconstitutional 'was a necessary predicate to the relief' . . . *United States v. Clark*, 445 US 23, 26 n.2, 100 S.Ct. 895, 899 n.2, 63 L.Ed.2d 171 (1980)." *Grace Brethren Church*, 102 S.Ct., at 2506 (footnote omitted).

As long as the result of the constitutional holding is that the district court alters the operation of the federal statutory scheme, then it is a constitutional ruling covered by § 1252. "That section applies, however the question of constitutionality may arise . . . ." *International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 304 US

243, 249 (1938). This case fits squarely within the definition adopted in *Grace Brethren Church.*

Although the Secretary concedes, as she must, that the district court below declared the federal statute unconstitutional as a "predicate to the relief", she maintains that an appeal contesting that relief is separate from the constitutional question. When a federal statute conferring benefits is challenged, however, the constitutional issue includes not only the validity of the statute but the remedy to be provided those harmed. As Justice Harlan wrote:

> "Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare [the law] a nullity and order its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." *Welsh v. United States,* 398 US 333, 361 (1970) (Harlan, J., concurring in result).

In *Califano v. Westcott,* 433 US 76 (1979), this Court specifically recognized that the extension/nullification issue must be faced as part of its constitutional ruling. Rejecting Justice Powell's argument in dissent that the question of extension is more properly a legislative matter (see 443 US, at 93-96), this Court explicitly determined the nature of the constitutional remedy that was necessitated by its affirmance of the district court's ruling on the merits.[8]

The "extension/nullification" problem in *Westcott* was

[8]The extension/nullification issue was not unique to *Westcott.* As Justice Blackmun noted, this Court had extended benefits to harmed class members as part of the constitutionally required relief in numerous cases before *Westcott.* See cases cited, 443 US, at 89-90. The issue continues to arise today. See *Heckler v. Mathews,* No. 82-1050, prob. jur. noted, 103 S.Ct. 1425 (1983).

raised in the separate appeal by state officials who agreed that the underlying statute was unconstitutional. The state's only issue was the degree of the extension, for no party argued for nullification. 443 US, at 90-91. This Court held that it had jurisdiction over this "separate appeal . . . pursuant to § 1252." *Id.*, at 83. The impact of the constitutional ruling and the nature of the remedy were not peripheral to the constitutional issue but part of it.[9]

The issue on appeal in this case is nearly identical to the state's appeal in *Westcott*. Both the Secretary and the plaintiffs agreed that benefits should be extended to the class members. The Secretary's dispute here is with the nature of the extension and how far the district court went in determining the constitutional remedy. As in *Westcott*, the only appeal lies to this Court under § 1252 to contest that determination.

The key question is the impact of the district court's constitutional ruling on the federal statutory scheme. Because the federal government was " 'bound by a holding of unconstitutionality' . . . this Court has jurisdiction under § 1252 to hear this appeal." *Grace Brethren Church, supra,* at 2507. The "mandate" of § 1252 is "unambiguous". *McLucas v. DeChamplain, supra,* at 31.

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[9]The Secretary may contend that jurisdiction over the state's appeal in *Westcott* was premised on the second paragraph of § 1252, since the federal government had already filed an appeal contending that the underlying statute was constitutional. See 443 US, at 83. But this Court expressly described the state's appeal as "separate" from the Secretary's, *id.*, at 83, and in light of this Court's recent observations about the "broad" language of the first paragraph of § 1252, *Regan v. Taxation with Representation of Washington, supra,* 103 S.Ct., at 1999 n.3, the more consistent conclusion is that the first, not the second, paragraph provided jurisdiction over the state's extension/nullification appeal.

C. The Secretary's Position is Contradicted by the Express Language of the Statute and by the Illogical Results Flowing From That Position.

The "clear commands" of § 1252 are set forth directly in the statute. On its face, it establishes four prerequisites for a direct appeal:

a. The order being appealed must be from one of the enumerated courts;
b. An Act of Congress must be held unconstitutional;
c. The proceedings must be civil;
d. The United States, or an agency, or officer thereof, must be a party. 12 Moore's Federal Practice § 411.11.

Even the Secretary agrees that this case fits squarely within those rules. When the "literal requirements of § 1252 are satisfied", this Court has jurisdiction. *Williams v. Zbaraz*, 448 US 358, 366 (1980).

The Secretary, however, argues that § 1252 entails a fifth requirement: that the appellant be seeking review of the district court's holding that an Act of Congress is unconstitutional. See Brief of Petitioner, at 15-41. The Secretary's position reflects both her attempt at rewriting the language of § 1252, and an effort to apply policies applicable to the other direct appeal provisions to § 1252.[10]

[10]The Secretary premises her entire argument on the theory that direct appeal statutes should be restrictively interpreted in order to minimize this court's appellate docket. See, e.g., Brief of Petitioner, at 18-19. As noted earlier, however, this Court has repeatedly held that Congress designed § 1252 as "an unambiguous exception to the policy of minimizing the mandatory docket of this Court." *Grace Brethren Church, supra*, at 2506.

Bread Political Action Committee v. Federal Election Committee,

The Secretary begins, as she must, "with the language of the statute itself." *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 US 176, 187 (1980). She contends that, because a constitutional ruling is a necessary predicate to a §1252 appeal, the issue appealed must be that same constitutional question. The Secretary's reading of the language of §1252 is unsupportable, however; there are no words in §1252 even suggesting that it is solely intended for constitutional issues. On the contrary, as previously noted, §1252 is unique among direct appeal statutes because it specifically mandates in its second paragraph that the Court consider all non-constitutional issues. When Congress intends to limit appeals to certain types of questions, it has explicitly said so. See, *e.g.*, 28 USC §1254 (2).

The Secretary's statutory analysis is also inconsistent with both *Regan v. Taxation with Representation of Washington, supra,* and *McLucas, supra.* In the former, this Court explicitly allowed the plaintiff below to appeal under §1252 a ruling by the district court *upholding* the constitutionality of the challenged statute. 103 S.Ct., at

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102 S.Ct. 1235 (1982), which the Secretary cites to support her policy argument, actually supports respondent's position. In that case, this Court upheld, in the absence of any clear evidence to the contrary, a literal interpretation of the Federal Election Campaign Act of 1971 (FECA), 2 USC §437h. Because the text was "plain[ ] enough" and had an "obvious meaning", 102 S.Ct., at 1238, the Court refused to read an additional party into the enumerated categories.

Respondent here also urges a literal interpretation of §1252, and that this Court follow the "clear commands" of Congress. Although a literal interpretation of §1252 may result in a modest expansion of this Court's appellate docket, as opposed to the restrictive result from the literal interpretation of the FECA, that is consistent with Congress' intent. *Grace Brethren Church, supra; McLucas v. DeChamplain, supra.* "[I]t would do violence to the purpose of Congress . . . to interpret §1252 restrictively." *Reid v. Covert,* 351 US 487, 490 (1956).

1999 n.3. Following past decisions which demand a literal interpretation of § 1252, this Court found the first paragraph of the statute "broad enough" to encompass such an appeal. *Id.*, at 1999-2000 n.3.[11]

The Secretary attempts to ignore the impact of *Regan* by claiming that because the ultimate issue in the plaintiffs' cross-appeal was a constitutional one, it was covered by § 1252. Nevertheless, *Regan* totally undercuts the Secretary's strained view of § 1252's language. See Petitioner's Brief, at 20-22. If, as the Secretary claims, the first paragraph of § 1252 "directly link[s] the right to appeal with the holding of unconstitutionality" (Pet.Brief, at 20), then the appeal by the plaintiffs in *Regan* from an unsuccessful and separate constitutional challenge would not be possible.

Regan, thus, reaffirms this Court's commitment to a literal, and therefore expansive, interpretation of § 1252's requirements.

Similarly, the Court's earlier analysis in *McLucas* belies the Secretary's proposed interpretation of § 1252's language. In *McLucas*, the constitutional issue, already resolved in another case,[12] was held to be "insubstantial", and not sufficient to convene a three-judge district court. 421 US, at 32.

Despite the fact that no constitutional issue was before the Court, Justice Powell found jurisdiction under § 1252 to resolve a claim of access to court-martial documents which was "independent" of the constitutional issue and "unrelated to the validity and interpretation of . . . any other Act

[11]Although Justice Rehnquist could easily have premised his analysis on the second paragraph of § 1252 (which the Secretary has suggested would have been the proper reasoning), his reliance instead on the first paragraph emphasizes the importance of his conclusion.

[12]*Secretary of Navy v. Avrech*, 418 US 676 (1974).

of Congress . . . ." *Id.*, at 33. Under the petitioner's interpretation, which demands that the appellant raise a constitutional issue, this result would not be possible.

The Secretary's view of the import of the second paragraph of § 1252 is equally faulty (see Pet.Brief, at 23-26). The intention of the second paragraph is to insure, unlike other direct appeal statutes, that *all* issues in the case will be before the Supreme Court. By employing such broad language, Congress assured that nothing would fall through the cracks and that its intentions were satisfied.

The Secretary's interpretation begins with a flawed premise, and proceeds to an irrational conclusion. Without explanation or support, she assumes that any appeal covered by the second paragraph of § 1252 must derive from an order holding an Act of Congress unconstitutional. Since the second paragraph presumes that some appeals do belong in the Court of Appeals, she argues that § 1252 divides cases where district courts have struck down federal statutes into two categories — one where appeal is proper in the Supreme Court, and the other where appeal is proper in the circuit court. The Secretary concludes that the only difference must be that in appeals to the Supreme Court the underlying constitutional issue has been raised. See Brief for Petitioner, at 23-26.

The Secretary's analysis neglects to consider that the prior circuit court appeals discussed in the second paragraph of § 1252 refer to appeals taken before the district court's constitutional ruling. For example, an interlocutory appeal under 28 USC § 1292(b) might be pending on a class issue in the Court of Appeals when the district court subsequently holds an Act of Congress unconstitutional. If a § 1252 appeal is then taken from the constitutional ruling, the § 1292(b) class issue would be an appeal "taken to . . .

[an]other court prior to such notice [under § 1252]".

Montana Contractors' Association v. Kreps, 442 US 935 (1979), does not stand for the contrary position. As a summary action by this Court, its precendential value is limited. *Mandel v. Bradley*, 432 US 173, 176 (1977); see also *id.*, at 179-180 (Brennan, J., concurring). This is especially true given its complicated procedural developments,[13] and the subsequent decisions of this Court where § 1252 has been extensively discussed. See, *e.g.*, *Grace Brethren Church, supra.*

Furthermore, the issue which the plaintiffs sought to appeal stemmed from the decision of the district court on a procedural matter — a motion to amend the complaint to order money damages. Those questions were not part of the results of the court's holding that a federal statute was unconstitutional; therefore, an appeal was proper to the Court of Appeals under § 1291. It could only have been heard directly in this Court under the second paragraph of § 1252 following a proper appeal from the constitutional ruling. On the other hand, when money damages are awarded by the lower court as part of its constitutional ruling, a proper appeal does lie under § 1252. *U.S. v. Clark, supra.*

The Secretary tries next to bolster her argument by looking to the legislative history of § 1252, despite the fact that nothing in the legislative history specifically addresses the

[13]For example, the Secretary's discussion of *Montana Contractors' Association* neglects to mention that the government had also filed a notice of appeal under § 1252. Given the government's appeal even the Secretary would have to concede that the plaintiffs' subsequent appeal was properly filed in this Court under § 1252. However, after the government decided not to perfect its § 1252 appeal, this Court, without explanation, then dismissed plaintiffs' appeal. See discussion in Motion of Federal Appellees to Dismiss or Affirm in No. 78-1546.

question now before the Court. The Secretary's attempt to find congressional support for imposing a requirement that all § 1252 appeals must include the merits of the constitutional question is but wishful thinking.

> "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted . . . . Perhaps the wisdom we possess today would enable us to do a better job . . . than Congress did . . . but even if that be true, we have no authority to substitute our views for those expressed by Congress in a duly enacted statute." *Mobil Oil Corp. v. Higginbotham,* 436 US 618, 625-26 (1978).

In addition, the legislative history of this provision must be viewed with skepticism. First, the Act of Aug. 24, 1937 was not limited to one issue. In addition to providing direct appeals from some district court rulings (Sec. 2), it also required notice and an opportunity to intervene to the attorney general when a federal statute is challenged as unconstitutional (Sec. 1), and the convening of three-judge district courts when injunctions were sought against federal statutes (Sec. 3). It is often hard to isolate which of the elements of the Act of 1937 is referred to in the legislative history. It does appear, though, that most of the discussions in Congress centered on section 1 of the Act. See 81 Cong.Rec. 3254-3264.

Furthermore, two of the key elements of § 1252 were not part of the original bill. As the secretary has noted, the original House provision allowed only the government to file a direct appeal and did not include the second paragraph of § 1252. The House debates, therefore, focused on the House version of the bill — which was not enacted.[14] The Sec-

[14] In fact, even the direct appeal portion of the Act of Aug. 24, 1937, § 2, was not part of the original House bill. The remarks of Rep. Summers sug-

retary's argument would certainly be more plausible if § 1252 limited the right of appeal only to the attorney general, and did not require the Court to consider the whole case on appeal. Since the attorney general's participation in a case was tied to the constitutional issue, the earlier version of § 1252 may have suggested a more limited direct appeal.

With little debate on the amendments, however, the Senate made two critical changes eventually agreed to by the House. First, appeal was permitted by "any party", thus eliminating the alleged tie between the appellant and the constitutional issue. Second, and more importantly, the second paragraph was inserted, reflecting Congress' desire to have the Supreme Court determine more than the constitutional issues. The early House debates are simply not relevant or useful for interpreting the final version of § 1252. "Absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 US 102, 108 (1980).

To the extent that the legislative history of § 1252 has any meaning for this case, it merely reflects Congress' concern over the impact of district courts' constitutional rulings on federal statutes. Congress desired to minimize the ability of district courts to interrupt federal programs without prompt review in the Supreme Court and participation of the attorney general. Congress was not solely concerned with the constitutional issue, but, rather, with a broader problem

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gest that it was understood that a § 2 allowing only the attorney general a direct appeal in the Supreme Court would be added. 81 Cong.Rec. 3254. An amendment to the bill providing such a limited direct appeal passed with virtually no opposition prior to House passage of the bill. 81 Cong.Rec. 3272.

implicated by a holding of unconstitutionality: the impact on federal officials and the programs under their administration. If the district court was to be able to direct the operation of the federal program, then the government, or the affected party, would be able to have the "whole" case heard as expeditiously as possible in this Court. Thus, if a district court decision holding a federal statute unconstitutional defined how the federal program would be run, it substantially impaired that program and "bound" the government to the effects of the constitutional ruling. These decisions, Congress decided, should be appealed under § 1252. *California v. Grace Brethren Church, supra.*

Finally, the Secretary's proposed limitations on § 1252 make little sense as a practical matter. The Secretary does not dispute that the district court below held a federal statute unconstitutional. Nor does she contend that the fact that other federal courts have also held the statute unconstitutional should affect the appealability of the district court's ruling. Indeed, the Secretary argues that even if the constitutional issue had been previously resolved by *this* Court, an appeal could still lie under § 1252. See Petitioner's Brief, at 36-40.

> "An appeal under § 1252 lies for any federal-court decision declaring an Act of Congress unconstitutional in a civil action in which the United States is a party, not just for the first such decision." *United States v. Clark, supra,* 445 US, at 25 n.2.

Thus, even the Secretary contends that the reasoning in *Denberg v. United States Railroad Retirement Board,* 696 F.2d 1193, 1195 (7th Cir. 1983), is faulty. Petitioner's Brief, at 36-41.

In effect, the Secretary proposes an appellate scheme under § 1252 which depends solely on the whims of the

appellant. Even if the appellant's constitutional argument is frivolous or insubstantial, direct review may be had in this Court as long as the appellant claims to be contesting the constitutional issue.[15]

For example, under the Secretary's rationale, the government could have appealed the district court decision in *Denberg* directly to this Court under § 1252 if it purported to contest the underlying constitutional issue. This would be possible even though this Court had just determined the invalidity of the same statutory provision in *Railroad Retirement Board v. Kalina*, 431 US 909 (1977), because, as the Secretary urges, "jurisdiction under 28 USC 1252 . . . cannot turn on . . . the degree to which the lower court's . . . determination of unconstitutionality was dictated by precedent." Petitioner's Brief, at 39.[16]

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[15]Furthermore, since the government has the unbridled and unilateral ability to contest a constitutional holding which has already been resolved adverse to it even in this Court, the government, under the Secretary's own logic, possesses an unchallengeable right to go either to the Court of Appeals or this Court in every instance. But this very right to proceed in this Court

> "serve[s] to deprive the Court of Appeals of jurisdiction, . . . for 28 USC § 1291 provides that '[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district court of the United States . . . except where a direct review *may* be had in the Supreme Court.' " *Donovan v. Richland County Assn. for Retarded Citizens, supra*, 102 S.Ct., at 713 (emphasis supplied).

In short, the logical implication of the Secretary's own reading of § 1252 is to place this case squarely within the controlling parameters of *Richland County*.

[16]The reason such an appeal might be filed is to allow this Court to determine whether or not the district court had jurisdiction — the main issue in *Denberg*, 696 F.2d, at 1194-1198. Section 1252 gives this Court power to determine the district court's jurisdiction. *McLucas v. DeChamplain, supra*.

It is absurd, however, to suggest that Congress intended § 1252, and its companion provision in § 1291, to provide a mechanism for appellate forum-shopping. It is also not logical for the proper appellate tribunal to be determined by decision of the appellant as to what issues should be argued, rather than the contents of the district court order. The structure of § 1252 suggests that Congress sought to provide a special avenue of appeal when a district court acted in a specified manner — not when a party made a particular claim.[17]

Further, the Secretary's proposition permits the same issue to be appealed directly to this Court over and over again. For example, the secretary could have appealed the partial summary judgment entered by the district court on May 22, 1981 (Pet.App. 3a-4a) under § 1252, and on remand, after this Court affirmed that ruling, the district court would have followed up with the January 22, 1982

[17]The difficulty of the Secretary's new test is further illustrated by the developments in this case. Although the Secretary did not support the challenged statute's constitutionality in the district court, she could have done so on appeal. See *U.S. v. Clark, supra.*

The Secretary's notice of appeal herein does not indicate what is appealed; presumably, had the government intended to contest the underlying statutory issue, it would have filed the identical notice of appeal. Under the Secretary's analysis, in most cases, the propriety of the notice of appeal could not be determined until briefs were filed. In this case, jurisdiction was determined solely by the Ninth Circuit's docketing statement. Respondent cannot believe that Congress intended Supreme Court jurisdiction to turn on the contents of a docketing statement which is not even required by federal rules or law.

If any line needs to be drawn limiting § 1252 appeals, it must focus on the impact of the district court's order holding a federal law unconstitutional. As long as the district court either directly or indirectly interrupts the federal statutory scheme devised by Congress on constitutional grounds, any appeal must be brought directly to this Court.

Order on constitutionally required relief (Pet. App. 5a-12a). Under the Secretary's rationale, the critical factor on whether another § 1252 appeal would lie is whether the government wishes to raise again (however specious) the constitutional question. If so, this Court would be required, under the Secretary's analysis, to hear the same issue on direct appeal a second time.

Whether appeals are covered under § 1252 must be determined by the actions of the district court, not the strategy of the appellants. Congress has carefully and unambiguously set forth specific requirements for when direct appeals are proper. As Justice Stevens recently observed:

> "[E]xperience teaches that strict adherence to the procedural requirements specified by the legislation is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver,* 447 US 807, 826 (1980).

II.

THERE IS NO REASON FOR THIS COURT TO VACATE THE JUDGMENT OF THE DISTRICT COURT BELOW.

In a final effort to extricate herself from the "unambiguous mandate" of § 1252, the Secretary argues that this Court should re-open the district court judgment so that she may file a timely appeal to this Court under § 1252. Brief of Petitioner, at 41-42. Her request is based on her continued belief that the requirements of § 1252 were not clear at the time that the district court entered its final judgment.

This Court has emphatically ruled, however, that it will

not continue to rescue the government when it fails to follow the proper avenue of appeal under § 1252. *Donovan v. Richland County Association for Retarded Citizens, supra.* As in *Richland County,* the alleged difficulties in this case stem from "the government's simple failure . . . to follow the clear commands of 28 USC § 1252". *Id.*, at 714. There is no excuse for the government repeating that error only three months after this Court explicitly described the effect of § 1252 and declined to order the judgment vacated in that case.[18]

[18] The Secretary could easily have protected her position by following the standard practice of filing two notices of appeal — one to this Court under § 1252, and one in the Ninth Circuit under § 1291. See, *e.g.*, Jur. Statement in *McLucas v. DeChamplain,* No. 73-1346.

Furthermore, vacating the district court's judgment could cause substantial harm to the respondent class members because the Secretary did not seek a stay of the court's Jan. 22, 1982 order, and the relief granted has been implemented. In fact, the district court entered an order on February 11, 1983 requiring all benefit eligibility determinations to be completed by August 6, 1983. Vacating the district court's final judgment is likely to cause confusion as to the government's obligation to continue paying these benefits and corresponding harm to the class members who have rightfully relied upon that obligation.

CONCLUSION

The judgment of the Court of Appeals dismissing the Secretary's appeal for lack of jurisdiction should be affirmed.

Respectfully submitted,

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